Supreme Court, U.S.
FILED

08-66 JUL 14 2008

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NO. 08-

In The

Supreme Court of the United States

TROY ANTHONY DAVIS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Georgia

PETITION FOR A WRIT OF CERTIORARI

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July 14, 2008

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CAPITAL CASE

QUESTION PRESENTED

Mr. Davis' request for an evidentiary hearing to examine his new innocence evidence sharply split the Supreme Court of Georgia. Since Mr. Davis' murder conviction, seven of nine State witnesses have recanted their trial testimony, and several new witnesses have identified or implicated a different individual, Redd Coles, as the shooter. A bare majority of four Georgia Supreme Court Justices denied Mr. Davis' motion for new trial and evidentiary hearing, citing a procedural requirement that witness recantations could never be material unless extrinsic evidence could show that the trial testimony of each recanting witness was the "purest fabrication" and that each piece of new evidence, standing alone, could prove Petitioner's innocence. Three of the seven justices argued that this case illustrates that the State's procedures for motions for new trial based on new evidence are "overly rigid and fail[] to allow an adequate inquiry into the fundamental question, which is whether or not an innocent person might have been convicted or even, in this case, might be put to death." App. A at 17a.

The questions presented are:

1. Does the Eighth Amendment to the U.S. Constitution create a substantive right of the innocent not to be executed so as to invoke the procedural requirements of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution when substantial evidence of innocence is discovered?

2. Alternatively, the Due Process Clause of the Fourteenth Amendment protects State-created liberty interests when State law mandates a decision favorable to an individual based on a set of substantive predicates. Georgia law creates an Extraordinary Motion for New Trial that mandates a new trial

based on newly-discovered evidence if the defendant can show that the new evidence meets six substantive predicates. Does Georgia's Extraordinary Motion for New Trial create a liberty interest protected by procedural due process?

3. If either the Eighth Amendment or Georgia law creates a liberty interest protected by the Due Process Clause, does the Supreme Court of Georgia's failure to grant an evidentiary hearing to review the cumulative substance and credibility of Mr. Davis' admissible new innocence evidence violate the procedural requirements of the Due Process Clause?

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Appendix B -- Order Denying Extraordinary Motion For New Trial And Motion For Stay Of Execution By The Superior Court Of Chatham County Georgia Dated July 13, 2007

PETITION FOR A WRIT OF CERTIORARI

Petitioner Troy Davis respectfully petitions for a writ of certiorari to review the opinion of the Supreme Court of Georgia or a remand to the State court to order an evidentiary hearing to consider the cumulative materiality of Mr. Davis' new evidence, including the recantations of State witnesses.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia, App. A, is reported at 283 Ga. 438, 660 S.E.2d 354 (2008). The opinion of the Superior Court of Chatham County Georgia, App. B, is unreported.

STATEMENT OF JURISDICTION

The opinion of the Supreme Court of Georgia was entered on March 17, 2008. *See* App. A. The Supreme Court of Georgia denied Mr. Davis' Motion for Reconsideration on April 14, 2008. *See* App. A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment of the United States Constitution states, in relevant part: "Nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

The Eighth Amendment of the United States Constitution states, in relevant part: "nor cruel and unusual punishments inflicted."

GA. CODE ANN. § 5-5-23 (2008) states: "A new trial may be granted in any case where any material evidence, not merely cumulative or impeaching in its character but relating to new and material facts, is discovered by the applicant after the rendition of a verdict against him and is brought to the notice of the court within the time allowed by law for entertaining a motion for a new trial."

GA. CODE ANN. § 5-5-41(b) (2008) states, in relevant part: "[N]o motion for a new trial from the same verdict or judgment shall be made or received unless the same is an extraordinary motion or case."

INTRODUCTION

The Supreme Court of Georgia's decision presents an important question concerning the process due in capital cases when new evidence is acquired.

With the advent of DNA testing methods, the possibility of wrongful executions has been reduced and the causes of wrongful convictions have become more evident. Most convictions of prisoners later found to be innocent have resulted from eyewitness misidentification, false confession and perjury. *See Kansas v. Marsh*, 126 S. Ct. 2516, 2545 (2006) (SOUTER, J., *dissenting*). Petitioner's case is a classic example of the unreliability of eyewitness testimony. Both the State and Petitioner agree that the murder was committed by one of two men: Mr. Davis or State witness Sylvester "Redd" Coles in a dimly-lit parking lot in the dark, early hours of the morning. New evidence has come to light that questions the core of the State's case in the form of eyewitness recantations, improper police tactics and testimony from multiple affiants that Redd Coles committed the murder. Yet, no court has ever examined Petitioner's new evidence to determine if he is innocent.

The number of DNA exonerations averaged twenty per year between 2000 and 2003,[1] and there is no reason to believe that the rate of wrongful convictions is lower in cases where DNA evidence is not available. When DNA evidence is not available, as it is not in this case, courts must resort to more judicial assurances of guilt by examining new evidence that has come to light since trial and testing its credibility. Since not all cases involve forensic evidence, courts must fulfill their duties as fact finders when petitioners present substantial non-forensic evidence of innocence. In this case, however, the State courts adopted procedures that rejected Mr. Davis' new recantation evidence without an evidentiary hearing.

This Court should grant certiorari to consider if either the State-created liberty interest in a new trial or the Eighth Amendment invokes the protections of procedural due process when a defendant in a capital case presents substantial new admissible evidence of innocence.

STATEMENT OF THE CASE

Petitioner appeals the denial of his Extraordinary Motion for New Trial filed pursuant to GA CODE ANN. §§5-5-23; 5-5-41(b) (2008).

In the early morning hours of August 19, 1989, Officer Mark MacPhail was murdered in a parking lot in Savannah, Georgia. The incident started when Sylvester "Redd" Coles began harassing a homeless man for a beer while Mr. Davis and others watched quietly from a distance. Coles verbally harassed and chased the homeless man to a nearby parking lot where Officer MacPhail was working. Coles threatened the retreating homeless man by exclaiming:

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[1] *See* Gross, Jacoby, Matheson, Montgomery, & Patil, *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & C. 523 (2006).

"You don't know me. Don't walk away from me. I'll shoot you." Mr. Davis and others silently followed the scuffle. During the altercation, the homeless man was struck on the head with a pistol and yelled for help. Officer MacPhail responded and was shot dead with a .38 caliber weapon by the same man who had pistol-whipped the homeless man. The parking lot was dark and the scene was chaotic. After the dust settled, the police took the statements of several onlookers but had no suspects. Redd Coles and Mr. Davis were both African-American males of similar age, height and weight.

The day after the shooting, another homeless man discovered a spent shell from a .38 caliber revolver near the scene of the murder. The shell was similar to -- and later found to match -- shell casings recovered near a shooting that occurred earlier that evening at a pool party not far from where Officer MacPhail was killed. The two hosts of the pool party confirm that Redd Coles was at the party. Mr. Davis was also at the party, but he was not with Coles. The pool party shooting occurred when four boys -- two of whom were Coles' neighbors -- were shot at as they drove away from the party. One of the car's passengers was shot in the face. Later that evening, as Coles' sister testified at trial, Coles got into a heated argument with Joseph Blige, one of the teenagers riding in the car. Although excluded from trial as hearsay, Coles' sister's police statements show that Blige exclaimed to Coles "I know y'all tried to kill me." Coles later admitted to carrying a .38 caliber revolver on the night of the shootings, but claimed that it was lost when the police attempted to recover the gun for testing. None of the boys riding in the car knew Mr. Davis or identified him as the pool party shooter; the police search of Davis' house less than 24 hours after the shooting turned up no gun.

After the police swarmed his neighborhood looking for suspects, Redd Coles and his attorney approached the

police to exonerate Coles and implicate Troy Davis. Before discovering that Coles had lied about carrying a .38 caliber gun – the same caliber as the murder weapon – on the night of the murder, the police had issued an arrest warrant for Davis without corroborating any part of Coles' story. After the warrant issued, Mr. Davis' picture was plastered on wanted posters and in the local Savannah media.

The police never searched Coles' house for the murder weapon, never included Coles' picture in witness photo spreads and paraded Coles in front of four State witnesses as a mere bystander in a crime scene "reenactment."

A jury convicted Mr. Davis of murder, aggravated assault, obstruction of a law enforcement officer and possession of a firearm during a felony and sentenced him to death. The State's case rested almost completely on the testimony of several witnesses, including Redd Coles.

All of the State witnesses -- save Redd Coles and Steve Sanders who first identified Mr. Davis at trial -- have recanted their testimony, claiming police coercion or questionable interrogation tactics (*e.g.*, showing the witness a single photo of Mr. Davis and asking if he was the shooter). Five new witnesses have now implicated Coles, not Troy Davis, in the murder of Officer MacPhail. One of these eyewitnesses has sworn that he was near the crime scene and saw Redd Coles shoot MacPhail. Another witness states she saw Coles hiding a gun in an empty house soon after the shootings. Three additional witnesses have stated that, since trial, Redd Coles has admitted to killing Officer MacPhail and escaping punishment.

The only remnants of the State's case against Petitioner are the self-serving testimony of Redd Coles and

Steve Sanders' dubious in-court identification of Mr. Davis that occurred two years after the crime.[2]

Following his state direct appeals and collateral review, Mr. Davis filed a petition for writ of habeas corpus in 2001, arguing that his innocence evidence allowed the habeas court to review his otherwise-defaulted constitutional claims. The habeas court refused to examine Mr. Davis' innocence claim or grant an evidentiary hearing. The Court of Appeals for the Eleventh Circuit affirmed the habeas court's decision, holding that habeas courts may reach the merits of constitutional claims without an examination of a petitioner's innocence claim.

Immediately after his federal habeas appeals, Mr. Davis filed for an Extraordinary Motion for New Trial provided for under Georgia law. The trial court rejected Mr. Davis' motion and refused to hold an evidentiary hearing, citing procedures that categorically reject recantation evidence without regard to its substance or credibility. A bare majority of the Supreme Court of Georgia affirmed, finding that an evidentiary hearing was unnecessary because State procedural rules for Extraordinary Motions for New Trial bar recantations unless extrinsic evidence shows that each recanting witness' trial testimony was the "purest fabrication." The court examined Mr. Davis' non-recantation evidence piecemeal and without reference to the cumulative effect of all of the evidence.

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[2] As of the date of this petition, Petitioner's counsel has been unable to interview Mr. Sanders. Sanders' police statement on the night of the shooting that he would not "recognize the shooter" directly contradicts his testimony two years later when he identified Mr. Davis for the first time at trial.

REASONS FOR GRANTING THE PETITION

Mr. Davis contends that both the Eighth Amendment and Georgia's Extraordinary Motion for New Trial create a liberty interest that requires the minimum due process of an evidentiary hearing in the State trial court to assess the cumulative effect of all his innocence evidence, including the State witness recantations.

I. Mr. Davis' Case Presents An Ideal Vehicle For this Court to Decide an Issue of Great Constitutional Import: Whether The Eighth Amendment Prohibits the Execution of the Innocent

Mr. Davis' case allows this Court an opportunity to determine what it has only before assumed: that the execution of an innocent man is constitutionally abhorrent. The Court need only determine if the Eighth Amendment bars execution of the innocent and then decide (*see infra* at III) whether Georgia's Extraordinary Motion for New Trial procedures afford sufficient due process protection. *Cf. Panetti v. Quarterman*, 127 S.Ct. 2842 (2007) (recognizing Eighth Amendment bars the execution of the insane, then finding that the State court procedures failed to provide the minimal due process for petitioner who had shown a "substantial threshold showing of insanity"); *Ford v. Wainwright*, 477 U.S. 399 (1986) (plurality opinion) (same for State executive procedures).

The Eighth Amendment's Cruel and Unusual Punishment Clause "draws its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). This Court takes into account "objective evidence of contemporary values before determining whether a particular punishment comports with fundamental human dignity that the [Eighth]

Amendment protects." *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality).

The "objective evidence of contemporary values" that informs the Eighth Amendment are evidenced in many ways. Public opinion, *Weems v. United States*, 217 U.S. 349, 378 (1910), jury verdicts, *McGautha v. California*, 402 U.S. 183, 199 (1971), and legislation, *Penry v. Lynaugh*, 492 U.S. 302 (1989), can all reflect the evolving standards of a maturing society. This Court has often looked to state statutes to determine contemporary values for purposes of Eighth Amendment analysis. *See Kennedy v. Louisiana*, --- S.Ct. ----, 2008 WL 2511282, *13 (2008) (citing cases). A consensus of State laws on the issue "is entitled to great weight." *Id.* at 18. Additionally, this Court has found that the Eighth Amendment "may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems*, 217 U.S. at 378.

In the fifteen years since *Herrera v. Collins*, 506 U.S. 390, 417 (1993), the basis for this Court's Eighth Amendment analysis has eroded. In *Herrera,* this Court assumed without deciding that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional." *Id.* at 417. The Court in *Herrera* based its Eighth Amendment analysis on the idea that "constitutional provisions [] have the effect of ensuring against the risk of convicting an innocent person." *Id.* at 398-99. And it held that "[o]ur society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent." *Id.* at 420 (O'Connor, J. *concurring*).

Since *Herrera* was decided, the country has become skeptical of the infallibility of our criminal system as shown by State statutory enactments and public opinion. The impact

of the DNA revolution had not begun to affect public confidence in the outcome of criminal trials when *Herrera* was decided. Since 1989, there have been 218 post-conviction DNA exonerations. When *Herrera* was decided in 1993, DNA had proven only 15 convictions to be erroneous.[3] Eyewitness misidentification testimony was a factor in 77 percent of post-conviction DNA exoneration cases, making it the leading cause of these wrongful convictions.[4]

Since *Herrera* and the influx of DNA exonerations, the States have come to a general consensus that criminal trials are imperfect. Starting in 1994 (one year after this Court's decision in *Herrera*), the vast majority of States have enacted statutes mandating DNA testing for the potentially innocent. Now, forty states, the District of Columbia and the United States have DNA statutes that mandate that courts compel DNA testing if the results would have a sufficient exculpatory effect.[5] Another three states have a State

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3 *See* www.innocenceproject.org/know; Gross, Jacoby, Matheson, Montgomery & Patil, *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & C. 523, 555 (2006).

4 *See* www.innocenceproject.org/Content/351.php

5 See 18 U.S.C. 3600(a)(6)-(8) (2008); ARIZ. REV. STAT. ANN. § 13-4240(A)-(B) (2008) ; ARK. CODE ANN. § 16-112-202(6)-(8) (West 2008) ; CAL. PENAL CODE § 1405 (West 2008) ; CONN. GEN. STAT. ANN. § 54-102kk(b) (West 2008) ; DEL. CODE ANN. tit. 11 § 4504 (2008) (requiring tests if the statutory requirements are met, as interpreted by Anderson v. Delaware, 831 A.2d 858, 865 (Del. Super. Ct. 2003)); D.C. CODE § 22-4133(d) (2008); GA. CODE ANN. § 5-5-41(c)(7) (2008) ; HAWAII REV. STAT. § 844D-123(a) (2008) ; IDAHO CODE ANN. § 19-4902(d)(2008) ; 725 ILL. COMP. STAT. ANN. 5/116-3 (West 2008) ; IND. CODE ANN. § 35-38-7-8 (West 2008; id. § 35-38-7-9 (2008); IOWA CODE ANN. § 81.10(2)(e) (West 2008) ; KAN. STAT. ANN. § 21-2512(c) (2008) ; KY. REV. STAT. ANN. § 422.285(1)-(2) (West 2008) ; LA. CODE CRIM. PROC.

(Continued...)

constitutional requirement or common law procedure to determine if DNA testing is mandatory.[6]

The fact that forty-seven U.S. jurisdictions have developed mandatory DNA procedures in the wake of 218 DNA exonerations shows a post-*Herrera* general consensus that the criminal system is fallible. The impact of the DNA revolution had not begun to affect public confidence in the outcome of criminal trials when *Herrera* was decided. *Herrera's* assumptions that "our society has a high degree of confidence in criminal trials" and that existing constitutional protections "have the effect of ensuring against the risk of convicting an innocence person" are plainly contrary to the large number of recent exonerations, contemporary norms and

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ANN. art. 926.1(A)(1)-(2) (2008) ; ME. REV. STAT. ANN. tit. 15 § 2138 (2008) ; MD. CODE. ANN., CRIM. PROC. § 8-201(c) (West 2008) ; MINN. STAT. ANN. § 590.01 (West 2008) ; MO. REV. STAT. § 547.035(7) (West 2008) ; MONT. CODE ANN. § 46-21-110 (2008) ; NEB. REV. STAT. § 29-4120(5) (2008) ; NEV. REV. STAT. ANN. 176.0918(5)(a) (West 2008) ; N.J. STAT. ANN. § 2A:84A-32a(4)-(5) (West 2008) ; N.M. STAT. ANN. § 31-1A-2(C) (West 2008) ; N.Y. CRIM. PROC. LAW § 440.30(1-a) (McKinney 2008) ; N.C. GEN. STAT. ANN. § 15A-269(a) (West 2008) ; N.D. CENT. CODE § 29-32.1-15(3) (2008) ; OHIO REV. CODE ANN. § 2953.71-.84 (West 2008) ; OR. REV. STAT. ANN. § 138.692(2) (West 2008) ; PA. CONS. STAT. ANN. § 9543.1 (West 2008) ; R.I. GEN. LAWS § 10-9.1-12(a)-(b) (2008) ; TENN. CODE ANN. § 40-30-304 (West 2008) ; TEX. CODE CRIM. PROC. ANN. art. 64.03 (Vernon 2008) ; UTAH CODE ANN. § 78-35a-301(6)(b) (West 2008) ; VT. STAT. ANN. tit. 13 § 5566 (2008) ; VA. CODE ANN. § 19.2-327.1(D) (West 2008); WASH. REV. CODE ANN. § 10.73.170(3) (West 2008); W. VA. CODE ANN. § 15-2B-14(e) (West 2008) ; WIS. STAT. ANN. § 974.07(7)(a)(2) (West 2008) ; FLA. R. CRIM. P. 3.853 ;. see also OKLA. STAT. ANN. tit. 22 § 1371.1-1371.2 (West 2008).

[6] *See Osborne v. Alaska*, 110 P.3d 986, 995 (Alaska Ct. App. 2005); *Lambert v. Mississippi*, 777 So.2d 45, 49 (Miss. 2002); *Davis v. Class*, 609 N.W.2d 107 (S.D. 2000).

public opinion. *Herrera*, 506 U.S. at 398, 420. For example, the Harris polling agency has stated that:

> There is one issue almost all Americans agree on – ninety-five percent of U.S. adults say that sometimes innocent people are convicted of murder while only five percent believe that this never occurs. This is a number that has held steady since 1999. Among those who believe innocent people are sometimes convicted of murder, when asked how many they believe are innocent, the average is 12 out of 100 or twelve percent.[7]

Forty-six States have enacted mandatory DNA testing in possible innocence cases. Ninety-five percent of Americans believe the innocent are often convicted and at least 218 persons have been wrongly convicted. Such "objective evidence" shows that this Court must revisit its analysis in *Hererra* and conclusively hold that the Eighth Amendment bars the execution of defendants with substantial reliable innocence evidence acquired since trial.

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[7] *See www.harrisinteractive.com/harris_poll/index.asp?PID=882 The Harris Poll* was conducted by telephone within the United States between February 5 and 11, 2008 among a nationwide cross section of 1,010 adults (aged 18 and over). Similarly, in a 2000 poll conducted for Newsweek by Princeton Survey Research Associates found that 82% of those polled agreed that "states should make it easier for Death Row inmates to introduce new evidence that might prove their innocence, even if that might result in delays in the death penalty process?" *See* www.pollingreport.com/crime.htm.

II. Georgia's Extraordinary Motion for New Trial Creates A Liberty Interest In A New Trial That Requires Fundamentally Fair Due Process Under the Fourteenth Amendment

Liberty interests protected by the Fourteenth Amendment may arise from State law. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). This Court has found State-created liberty interests for prisoners, including -- among others -- the rights to: parole,[8] good-time credits for satisfactory behavior,[9] and the freedom from involuntary transfer to a mental hospital.[10] State-created liberty interests protected by the Due Process Clause are found in "statutes or other rules defining the obligations of the [State authority charged with granting the liberty interest]." *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981); *see also Vitek v. Jones*, 445 U.S. 480, 489-91, 493 (1980) (finding prisoner's liberty interest in right to be free from mental hospital transfer was derived from "state law and official penal complex practice" as well as the U.S. Constitution.)

State law creates a liberty interest protected by the Due Process Clause by mandating a certain individual right or benefit once certain "substantive predicates" have been met. *See Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 10 (1979) (liberty interest created under State law where "there is [a] set of facts which, if shown, mandate a decision favorable to the defendant."); *Board of Pardons v. Allen*, 482 U.S. 369 (1987) (same). In *Greenholtz* and *Allen*, this Court

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[8] *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979).

[9] *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).

[10] *Vitek v. Jones*, 445 U.S. 480, 489-91, 493 (1980).

found that the State parole statutes at issue created a due process liberty interest in release from prison. *See Greenholtz*, 442 U.S. at 12; *Allen*, 482 U.S. at 377-78. The State parole statutes created a protected liberty interest by conferring "broad discretion" upon the state parole boards to make parole decisions using prescribed substantive predicates that, once satisfied, mandated a certain result (conditional release from prison). *Id.* at 375 (interpreting *Greenholtz*).

Since the State parole boards had to make a "necessarily subjective" decision using substantive predicates that could "not be applied mechanically," the process by which those decisions were made required fundamentally fair due process. *See id.* at 375-376 (interpreting *Greenholtz*). Since parole was mandatory upon a favorable determination of substantive predicates, release from prison was more than a mere unilateral hope, but a constitutionally protected expectation. *See id.* at 375-376 (interpreting *Greenholtz*).

Although determinations of whether a State statute creates a constitutionally protected liberty interest are questions of federal law, this Court defers to State court interpretations in determining whether the State statue at issue is mandatory. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). In *Greenholtz*, the Court noted with regret that it was denied the benefit of the Nebraska courts' interpretation of whether the State law at issue was mandatory. 442 U.S. at 12 (citing approvingly); see also *Allen*, 482 U.S. at 369, 377 n. 8 (implying that a Montana Supreme Court interpretation of whether the relevant parole statute was mandatory would have been instructive if there had been a decision on point).

Here, Georgia State law grants Mr. Davis a liberty interest in a new trial. Georgia's Extraordinary Motion For New Trial mandates a new trial if the defendant can show

new evidence that meets six substantive predicates.[11] Although the relevant statute provides that a new trial "may be granted,"[12] the controlling interpretation of the Georgia Supreme Court is that:

> While the statute states that a new trial 'may be granted,' this does not mean that in a proper case, where all the rules of law have been met, a new trial may or may not be granted, but on the contrary it means that in such a case a new trial *must* be granted." *Bell v. State*, 227 Ga. 800, 805, 809, 183 S.E.2d 357, 362 (1971) (*citing Werk v. Big Bunker Hill Mining Corp.*, 193 Ga. 217, 228, 17 S.E.2d 825 (1941); *Matthews v. Grace*, 199 Ga. 400, 405, 34 S.E.2d 454, 457 (1945)) (emphasis added).

Georgia law prescribes six substantive predicates for the trial judge to determine whether a new trial must be granted. It is incumbent on a defendant to show: "(1) the newly discovered evidence has come to [the defendant's] knowledge since the trial; (2) want of due diligence was not the reason that the evidence was not acquired sooner; (3) the evidence was so material that it would probably produce a different verdict; (4) it is not cumulative only; (5) the affidavit of the witness is attached to the motion or its absence accounted for; and (6) the new evidence does not operate

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[11] Due process protections do not turn on whether State law uses a shall/unless formula. *Board of Pardons v. Allen*, 482 U.S. 369, 378 (1987) (finding state parole statute mandatory for purposes of due process protection where the statute mandated release "if" or "when" the substantive predicates had been found.).

solely to impeach the credit of a witness." *Bell v. State*, 227 Ga. 800, 805, 183 S.E.2d 357, 360-61 (1971).

These predicates for a new trial require the same -- if not more -- subjective discretion as required by the parole statutes at issue in *Greenholtz* and *Allen*.[13] The trial court must determine the nature of the evidence, compare it to the evidence adduced at trial and judge whether the new evidence would materially affect the jury's verdict. *Id.* Similar to the relevant factors for parole in *Allen* and *Greenholtz*, Georgia cases show that the predicates for a new trial cannot "be applied mechanically." *See, e.g., Bell*, 227 Ga. at 807 (the materiality element "cannot be reduced to a mathematical probability"). Instead, Georgia courts are tasked to make "necessarily subjective" credibility determinations of new witnesses and weigh the probative effect of new evidence.

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[13] In *Allen*, the Montana parole statute at issue mandated parole "Subject to the following restrictions ... when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community ... A parole shall be ordered only for the best interests of society and not as an award of clemency or a reduction of sentence or pardon. ... A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen." 482 U.S. at 376 (quoting Mont.Code Ann. § 46-23-201 (1985)).

In *Greenholtz*, the Nebraska parole statute mandated parole unless "(a) there is a substantial risk that he will not conform to the conditions of parole; (b) his release would depreciate the seriousness of his crime or promote disrespect for law; (c) his release would have a substantially adverse effect on institutional discipline; or (d) his continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date." The statute also set forth a list of 14 factors that the Nebraska parole board must consider in reaching a decision. *Greenholtz*, 442 U.S at 11-129 (quoting Neb.Rev.Stat. § 83-1, 114(1) (1981)).

See, e.g., *Drake v. State*, 248 Ga. 891, 287 S.E.2d 180 (1983) (assessing the credibility of a recanted State witness' testimony given at an evidentiary hearing); *Humphrey v. State*, 207 Agape. 472 (475), 428 S.E.2d 362, 364 (1993) (finding an abuse of discretion for the trial court to "pass[] upon the credibility" of a exculpatory new witness).

The liberty interest in a new trial created by Georgia law is more substantial than other State-created interests this Court has recognized. In *Wolff, Greenholtz and Allen*, this Court recognized that the loss of good-time credits for early release or the possibility of parole implicates a State-created liberty interest even though the forfeiture only deprived the prisoner of freedom he expected to obtain sometime in the future.[14] Mr. Davis' State-created liberty interest in a new trial is more substantial than an interest in parole. If, after an evidentiary hearing, the trial court determines Mr. Davis' new evidence meets the six substantive predicates, Mr. Davis' conviction must be overturned. Mr. Davis will enjoy the rights and benefits of the accused, which include the right to pre-trial release (or at least non-punitive pre-trial incarceration), the right of presumed innocence, the right to counsel and the right to have a jury of his peers determine whether he is guilty beyond a reasonable doubt.

Unlike the reversal of a conviction, parole -- the liberty interest at issue in *Greenholtz* and *Allen* -- does not affect the prisoner's conviction but instead is only "an established variation on imprisonment of convicted criminals" that allows for release from prison "on the condition that the prisoner abide by certain rules during the balance of the

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[14] In *Wolff v. McDonnell*, this Court held that the State created a liberty interest by mandatory statute that provided for good time credits toward early release. 418 U.S. at 557.

sentence." *Morrissey v. Brewer*, 408 U.S. 471, 477-78 (1972). Parole necessarily restricts a parolee's liberty "substantially beyond" those who have not been convicted of a crime, and the Constitution does not entitle parolees to "the full panoply of rights due a defendant" when the State seeks re-incarceration through parole revocation. *Id.* at 478, 480.

By contrast, the liberty interest at issue in this case involves the imminent execution of an inmate in spite of the existence of new innocence evidence that has never been tested in a hearing. The State-created liberty interests in *Wollf, Greenholtz* and *Allen* involved only the expectation for conditional release from prison. Here, Georgia law creates an expectation that the innocent will not be executed upon a showing of newly-discovered material evidence that meets certain substantive criteria.

A. This Court Should Decide Whether A Positivist Approach to Finding State-Created Rights Is Still Viable After Sandin

This Court should clarify the analytical framework applied to determine when State-created rights require due process protections.

In *Wolff, Greenholtz*, and *Allen*, discussed *supra*, the Court recognized that the liberty interests protected by procedural due process can be created by State law. In *Wolff*, inmates earned good time credits under a State statute that mandated sentence reductions for good behavior revocable only for "flagrant or serious conduct." 418 U.S. at 545-546. Although the Due Process clause itself did not create a liberty interest in good time credits, this Court found that a mandatory State statute created an interest in a "shortened prison sentence" that was protected by due process. *Id.* at 557. This Court characterized the prisoner's State-created expectation of a shortened prison sentence as a liberty interest with "real substance." *Id.* at 557.

After *Wolff*, this Court in *Greenholtz* and *Allen* found that nearly identical mandatory State parole statutes created a protected liberty interest in conditioned release by using "language of an unmistakably mandatory character" subject to discretion set out in "specified substantive predicates." *Greenholtz*, 442 U.S. at 12; *Allen*, 482 U.S. at 377-78. In *Allen*, this Court went on to note that parole decisions implicated an interest "at the heart of the liberty protected by the Due Process Clause." *Allen*, 482 U.S. at 373 n.3. Unlike in *Wolff* and *Allen*, this Court in *Greenholtz* did not analyze whether the expectation created by State law was a liberty interest of "real substance" or "at the heart" of due process.

After *Greenholtz* and *Allen* were decided, this Court and the lower federal courts wrestled with various mandatory State statutes and regulations to determine whether due process extended to relatively mundane aspects of prison life, including rights associated with visitation privileges, tray lunches, paperback dictionaries and the provision of electrical outlets for televisions.[15] The liberty interests involved in these cases were far from substantial. Hence, it was not surprising that the Court in 1995 held that "the time has come to return to the due process principles we believe were correctly established in *Wolff* ..." when interpreting State-created liberty interests. *Sandin v. Conner*, 515 U.S. 472, 483 (1995).

In *Sandin v. Conner*, this Court altered the analytical framework to be used to determine State-created liberty interests. The prisoner in *Sandin* challenged his 30-day solitary confinement, arguing that a mandatory State prison regulation created a liberty interest in being free from disciplinary segregation. *Id.* at 476. In overturning the Court

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[15] *See Sandin v. Conner*, 515 U.S. 472, 483 (1995).

of Appeals decision, this Court explicitly eschewed *Greenholtz*'s use of the mandatory/discretionary analysis of State law. Instead of focusing on the mandatory language of the State regulation at issue this Court held that States "under certain circumstances" create liberty interests entitled to due process but that those interests "will be generally limited to freedom from restraint which ... imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" or "inevitably affect[s] the duration of his sentence." *Id.* at 484, 487.

Sandin did not overturn the mandatory/discretionary framework used in *Greenholtz* and *Allen* but found that due process protected only State-created liberty interests of "real substance." The Court characterized the mandatory/discretionary determination as a "somewhat mechanical dichotomy" that failed to look at "whether the State created an interest of 'real substance' comparable to the good time credit scheme of *Wolff*." *Id.* at 479-80. What is telling is that after Court found that *Greenholtz*'s mandatory/discretionary analysis was misguided, it approvingly cited *Allen* for the proposition that "we recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause." *Id.* at 484. *Sandin's* explicit rejection of *Greenholtz's* analysis and its favorable citation to *Allen* 's application of the same mandatory/discretionary framework to nearly identical parole statutes can only be explained by the sole difference between those opinions: *Allen* ensured that the State-created liberty interest was "at the heart" of due process while *Greenholtz* confined its analysis to the State statute.

Recently in *Wilkinson v. Austin*, 545 U.S. 209 (2005), this Court once again addressed the issue of the mandatory/discretionary framework. This Court reiterated that "after *Sandin*, it is clear the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the

language of regulations regarding those conditions . . .." *Id.* at 223. In *Wilkinson* this Court noted that "in *Sandin's* wake the Courts of Appeals have not reached consistent conclusions for identifying the baseline from which to measure" whether a hardship imposed on a prisoner amounts to a due process violation. *Id.* at 223. While acknowledging that inconsistencies were already apparent across the circuits, this Court declined to define further the baseline for determining whether a liberty interest exists for certain conditions of confinement, or to elaborate further on the breadth of *Sandin*'s reach. *Id.*

Circuit courts have had difficulty in deciding whether *Sandin* supplants or supplements the mandatory/discretionary framework previously utilized to determine the existence of a liberty interest protected by due process. Read narrowly, *Sandin* found only that the mandatory/discretionary analytical framework is "a good deal less sensible in the case of a prison regulation primarily designed to guide correctional officers in the administration of a prison . . . [as] such regulations are not designed to confer rights on inmates." *Sandin*, 515 U.S. at 481-82. More broadly, however, *Sandin* sharply criticized the positivist approach to determining State-created liberty interests and advocated for a return to the natural rights theory of due process.

Perhaps the most illustrative case on point, *Ellis v. District of Columbia*, 84 F.3d 1413 (D.C. Cir. 1996), discussed both the issue of whether *Sandin* applies in the parole context, as well as the proper analysis for determining if a due process right exists with regard to parole. The court in *Ellis* re-stated the proposition set forth in *Greenholtz* and *Allen* that the language of certain state-promulgated statutes and regulations could give rise to a state-created liberty interest. *Id.* at 1417. However, after the decision in *Sandin*, the court noted that "where the Supreme Court stands on this subject is no longer certain." *Id.* The court discussed the *Sandin* test and how it appeared "ill-fitted to parole eligibility

determinations" and went on to pose the question, "where does this leave us?" *Id.* at 1418. Ultimately, the court held that the tests set forth in *Greenholtz* and *Allen* were still applicable "until the court instructs us otherwise." *Id.*

As the Court held in *Wolff*, "the State having created the right [and] the prisoner's interest ha[ving] real substance," he is entitled to "those minimal procedures appropriate under the circumstances ... to insure that the State-created right is not abrogated." 418 U.S. at 557.

III. Procedural Due Process Requires That Mr. Davis Have the Opportunity to Present Witnesses to the State Trial Court in an Evidentiary Hearing

The procedural safeguard proposed by Mr. Davis to protect his Eighth Amendment or State-created interest is simple: an evidentiary hearing in the State trial court to assess the cumulative materiality and credibility of his new innocence evidence. Whether Mr. Davis' liberty interest arises from the Eighth Amendment or Georgia State law, the Due Process Clause of the Fourteenth Amendment requires that the State trial court hold a hearing.

Due process analysis provides that once the Court has determined that the U.S. Constitution or State-law creates a due process requirement by recognizing a protected liberty interest, the question becomes "what process is due." *Morrissey*, 408 U.S. at 481. The cornerstone for all analysis of procedural adequacy has become Justice Powell's opinion in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Mathews* requires consideration of three distinct factors: (1) the private interest that will be affected by the State action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value of additional or substitute procedural safeguards; and (3) the State's interest, including the function involved and the fiscal and

administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

A. Application of the Mathews Factors Shows that an Evidentiary Hearing is the Minimum Due Process Required

Mr. Davis' private interest in his Extraordinary Motion for New Trial proceedings -- the first *Mathews* factor -- is weighty. Simply put, Mr. Davis' motion for new trial proceedings determines whether he will live and be free or die. No interest could be more important. *See Wolff*, 418 U.S. at 560 (finding that the deprivation of good time credits for early release "are unquestionably a matter of considerable importance" for *Mathews*-balancing purposes); *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (plurality opinion) (Marshall, J.) ("In capital proceedings generally, this Court has demanded that fact-finding procedures aspire to a heightened standard of reliability.... This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different.").

The second *Mathews* factor addresses (a) the risk of an erroneous execution under the current procedures in place to evaluate an Extraordinary Motion for New Trial and (b) the probable value of an evidentiary hearing to consider Mr. Davis' new evidence, including the recantations of seven State witnesses.

The "lodestar" of any effort to devise a procedure when the defendant's life is at stake is the "clear need for trustworthiness in any factual finding that will prevent or permit the carrying out of an execution." *See Ford*, 477 U.S. at 424 (1986) (Powell, J. *concurring* in the order of an evidentiary hearing on the question of petitioner was competent to be executed). When the stakes are so high, "it is

all the more important that the adversary presentation of relevant information be as unrestricted as possible." *Id.* at 417.

In *Ford*, Justice Powell's controlling opinion found that Florida's refusal to consider relevant evidence of insanity before an execution of a defendant who had made a substantial showing of incompetence violated due process. *Id.* The Florida statute at issue left insanity determinations to its Governor. *Id.* at 424. Florida's Governor had a stated policy of excluding from his consideration any evidence submitted by the prisoner. *Id.* This Court held that Florida's fact-finding procedure to exclude a prisoner's insanity evidence from consideration "invites arbitrariness and error ... [and] does not, therefore, comport with due process." *Ford*, 477 U.S. at 424.

Similarly in *Panetti*, the Court recently held that the procedures used by a State court to determine insanity violated due process by failing to allow the defendant to submit relevant evidence (expert psychiatric evidence). *Panetti v. Quarterman*, 127 S.Ct. at 2842, 2857-58 (2007). The exclusion of relevant evidence which was sure to "invite arbitrariness and error" in the state court's competency determination and, thus, violated due process. *Id.*

Here, Georgia's Extraordinary Motion for New Trial procedures creates a substantial risk of an arbitrary and erroneous execution by excluding recantation evidence without regard to its credibility or substance. The Supreme Court of Georgia held that recantation evidence is immaterial unless the defendant can show that the recanted witness' trial testimony was the "purest fabrication" by "extrinsic proof that the witness' prior testimony was physically impossible." App A at 6a. As the Georgia Supreme Court dissenting opinion stated, application of majority's "categorical rule" against recantation evidence "fails to allow an adequate inquiry into

the fundamental question, whether or not an innocent person might have been convicted or even, as in this case, might be put to death." App. A at 17a.

In barring relevant recantation evidence, the Supreme Court of Georgia confuses materiality with reliability. Materiality is a well-defined legal concept. This Court has held that evidence is material if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). Georgia courts have held that materiality turns on whether the evidence would "probably produce a different verdict." *Bell*, 227 Ga. at 805. It follows that a recantation lacks materiality only if it has been determined to be unreliable. Otherwise, a reliable recantation may sufficiently undercut the evidence at trial so as to "undermine the confidence in the verdict" or "probably produce a different verdict." Neither the trial court nor the Supreme Court, however, concluded that Mr. Davis' recantation evidence was unreliable. To do so would have required an evidentiary hearing or at least a facial evaluation of the affidavits' credibility.

Any trustworthy fact-finding procedure must require cumulative analysis of "all the evidence." The trial court and the Georgia Supreme Court exacerbated the risk of an erroneous execution by considering each piece of Mr. Davis' new evidence in isolation. This Court has repeatedly instructed that federal habeas courts evaluate new innocence evidence cumulatively, requiring "a holistic judgment about all the evidence." *House v. Bell*, 547 U.S. 518, 538-40 (2007). It is clear that this Court believes that review of innocence evidence "in isolation" from other exculpatory evidence might allow courts to make erroneous innocence determinations. *See id.* at 552 (finding that the victim's husband's post-trial demeanor and actions might have been

erroneously disregarded if "considered in isolation" from other exculpatory evidence).

However, the trial court and the Georgia Supreme Court did just what this Court cautioned against in *House*. The Georgia Supreme Court considered each of Mr. Davis' sixteen affidavits in isolation, dismissing each one as immaterial because none, standing alone, conclusively proved Mr. Davis' innocence. *See generally* App A; *see*, e.g., at 7a (rejecting evidence because "even if the recantations of Sapp and McQueen were credited as true, they would show merely that Davis did not admit his guilt to these witnesses, not that Davis was [innocent]"). Had either court considered the evidence cumulatively, both courts would likely have seen that each recantation is reinforced by recantations of other unrelated witnesses and that the recantations, in turn, are reinforced by four affidavits implicating Redd Coles as the shooter.

The need and probable value of an evidentiary hearing -- part (b) of *Mathews'* second factor -- is also shown by the Georgia Supreme Court's inaccurate *obiter dictum* observations about Mr. Davis' new evidence. After holding that the recantation evidence was immaterial *per se*, the court observed that "most" of Mr. Davis' recantation affidavits were merely statements that the eyewitness "now do not feel able to identify the shooter." App. A at 15a. The majority's mistake is an error attributable to the lack of an evidentiary hearing. The submitted affidavits clearly show that none of the four recanting eyewitness (the other 3 recanting witnesses were not eyewitnesses) was able to identify the shooter at trial or on the night of the crime.[16] If the court had the benefit of

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[16] Dorothy Ferrell's affidavit clearly states that she was not able to identify the shooter at trial or on the night of the crime:

(Continued...)

an evidentiary record, it would not have made such erroneous observations.

The State's interests in finality and preserving scarce judicial resources -- the final *Mathews'* factor -- is far outweighed by the potential for an erroneous conviction created by the lack of an evidentiary hearing. This Court or

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> "I didn't see who was doing the shooting, I just heard the gunshots. I didn't want to get up there and [testify] that I saw who did the shooting because I didn't see that part. But I felt like I had to say that."

D.D. Collins' affidavit shows that he "never" saw Mr. Davis do anything:

> "I testified against Troy at his trial. I remember that I told the jury that Troy hit the man Redd was arguing with. That is not true. I never saw Troy do anything to the man."

Larry Young's affidavit shows that he "never" — at trial or the night of the shooting — was able to identify the shooter or what he was wearing:

> "[The Police] kept asking me what had happened at the bus station and I kept telling them that I didn't know. Everything happened so fast down there. I couldn't honestly remember what anyone looked like or what different people were wearing. Plus, I had been drinking that night so I just couldn't tell who did what. ... I was *never* able to make sense of what happened that night. It's as much of blur now as it was then." (emphasis added)

Antoine Williams' affidavit also clearly states that:

> "At Troy Davis' trial, I identified him as the person who shot the officer. Even when I said that, I was totally unsure whether he was the person that shot the officer. I felt pressure to point at him because he was the only one sitting in the courtroom." (emphasis added).

the State court may fashion rules to limit the need for evidentiary hearings to truly substantial innocence cases. In *Ford* and *Panetti*, this Court limited the strain that non-meritorious insanity claims may have on the judicial system by requiring "a substantial threshold of insanity" before requiring a hearing. *Panetti*, 127 S.Ct at 2856 (*citing Ford*, 477 U.S. at 426, 424). Similarly, the facts of this case limit the requirement of a hearing to instances where the defendant faces imminent execution despite substantial new admissible innocence evidence (*i.e.*, recantations from seven of nine State trial witnesses and four new witnesses implicating the alternative suspect who had the motive and means to have committed the crime) that has never been the subject of a State or federal evidentiary hearing. Lastly, Mr. Davis does not request the grant of a new trial at this juncture, but only an evidentiary hearing in State court.

Moreover, State perjury laws have prevented an influx of non-meritorious recantation cases. Georgia law, similar to other States, provides harsh penalties that ensure against spurious recantations, especially in capital cases. *See* GA. CODE ANN. § 16-10-70(b) ("A person convicted of the offense of perjury that was a cause of another's being punished by death shall be punished by life imprisonment."); *see also* § 17-3-2(2) (tolling statute of limitations until government discovers the crime). Thus, it is not surprising that the only Georgia recantation cases that Mr. Davis' counsel could find involved either accomplices who had little to lose after their own convictions or family members (or close relations) of the defendant who had the inclination risk a perjury charge for a loved one.[17] No doubt the State could

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[17] Courts have declared that accomplice testimony is "inherently suspect" because "there is very little to deter the pleading co-defendant from untruthfully swearing out an affidavit in which he purports to shoulder the entire blame" after his conviction is final or inevitable. *U.S. v. La*

(Continued...)

fashion a less restrictive recantation rule that eschews accomplice or family member recantations as inherently unreliable.

This Court has found evidentiary hearings designed to protect far less substantial private interests "should not impose a great burden on ant State[]." *See Morrissey*, 408 U.S. at 490 (a hearing required by due process to protect a parolee's interest in continued conditional release would not burden State parole systems, as the State can fashion rules to prevent abusive litigation tactics and the parolee could not re-litigate issues determined in other forums); *Wolff*, 418 U.S. at 566 (requiring a hearing to protect a prisoner's right to good-time credits as long as not "unduly hazardous to institutional safety or correctional goals"). In fact, a study of the case law cited by the Georgia Supreme Court shows that Georgia courts often hold evidentiary hearings to determine credibility issues in cases with far less evidence than presented here.[18]

Duca, 447 F.Supp. 779 (D. N.J. 1978); *see also Steve Davis v. State*, 221 Ga.App. 375, 471 S.E.2d 307 (1996) ("[Accomplice's] attempt to exculpate [Defendant] is inherently suspect. Credibility will almost always be suspect when newly available evidence is the testimony of a fellow participant in the crime who attempts to testify helpfully to a colleague only after his own case has been adjudicated. It comes with little reliability to rescue it from its tainted circumstances."); *U.S. v. Carlin*, 573 F.Supp. 44 (D. Ga. 1983) ("a defendant who now seeks to exculpate his co-defendant lacks credibility, since he has nothing to lose by testifying untruthfully regarding the alleged innocence of the defendant seeking a retrial."). Likewise, courts are skeptical of recantations from State witnesses with close relationships with the defendant. *See* Shawn Armbrust, *Reevaluating Recanting Witnesses*, B.C. Third World L.J. 75, 85 (2008).

[18] *See, e.g., Hester v. State*, 282 Ga. 239, 647 S.E.2d 60 (2007) (hearing held based on single out-of-court confession by third-party); *Drake v. State*, 248 Ga. 891, 287 S.E.2d 180 (1982) (hearing held based on one recantation - defendant's accomplice); *Brown v. State*, 209 Ga.App. 314, 433 S.E.2d 321 (1993) (hearing held based on one recantation -

(Continued...)

Lastly, the public interest in ensuring that the innocent are not executed is a substantial factor that a simple hearing would vindicate. *See, e.g., Morrissey*, 408 U.S. at 484 (finding that societal interests are relevant for *Mathews* balancing). As previously discussed, the public has become increasingly pessimistic about the accuracy of the judicial system as many believe that the innocent have been convicted or even executed. DNA exonerations have flamed that fire, proving the fallibility of eyewitness testimony and the abundance of coerced State witnesses. The State's case was made up almost entirely of this type of questionable evidence. Society, thus, has an interest in ensuring that the executed who can produce substantial, admissible new evidence of their innocence are not executed without the opportunity to vindicate themselves through the minimal process required by our Constitution. A hearing to determine the cumulative materiality and credibility of Mr. Davis' new evidence is the minimal process that is due.

CONCLUSION

The petition for a writ of certiorari should be granted or remanded with an order to the State court to order an evidentiary hearing to consider the cumulative materiality of Mr. Davis' new evidence, including the recantations.

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defendant's daughter); *Young v. State*, 269 Ga. 490, 500 S.E.2d 583 (1998) (hearing held based on two out-of-court confessions by third party); *Stroud v. State*, 247 Ga. 395, 276 S.E.2d 597 (hearing held where witness, defendant's girlfriend, renounced immaterial portion of her testimony but did not recant the fact that the defendant confessed to committing the crime); *Crowe v. State*, 265 Ga. 582, 458 S.E.2d 799 (1995) (this Court ordered an evidentiary hearing on single affidavit submitted by the defendant himself).

Respectfully submitted,

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July 14, 2008

APPENDIX

APPENDIX A -- DENIAL OF MOTION FOR RECONSIDERATION AND ISSUANCE OF A SUBSTITUTE OPINION BY THE SUPREME COURT OF GEORGIA DATED APRIL 14, 2008

SUPREME COURT OF GEORGIA
Case No. S07A1758

Atlanta April 14, 2008

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

TROY ANTHONY DAVIS v. THE STATE

Upon consideration of the Motion for Reconsideration filed in this appeal, it is ordered that it be hereby denied. The opinion of the Court in the above-styled case issued on March 17, 2008, is withdrawn from the files, and a substitute opinion issued in this case.

It is ordered that the January Term relative to this case is extended until further order of the Court to enable the parties to file a motion for reconsideration within 10 days of the filing date of the new opinion. OCGA § 15-2-4; Haygood v. City of Doraville, 25 Ga. 566, 567 (1986).

All the Justices concur, except Sears, C. J., Hunstein, P. J., and Benham, J., who dissent.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and seal of said court hereto affixed the day and year last above written.

s/Lynn M. Stinchcomb, Chief Deputy Clerk

In the Supreme Court of Georgia

Decided: March 17, 2008

S07A1758. DAVIS v. THE STATE.

MELTON, Justice.

Troy Anthony Davis was convicted of murdering Savannah police officer Mark MacPhail[1] and of related crimes. He was sentenced to death for the murder, and this Court affirmed. Davis v. State, 263 Ga. 5 (426 SE2d 844) (1993), cert. denied, 510 U. S. 950 (114 SC 396, 126 LE2d 344) (1993). He filed a petition for writ of habeas corpus in the Superior Court of Butts County, and this Court affirmed the denial of that petition. Davis v. Turpin, 273 Ga. 244 (539 SE2d 129) (2000), cert. denied, 534 U. S. 842 (122 SC 100, 151 LE2d 59) (2001). See also Davis v. Thomas, 266 Ga. 835 (471 SE2d 202) (1996) (reversing the habeas court's denial of a continuance). He filed a federal habeas petition, and his appeals from the denial of that petition failed. Davis v. Terry, 465 F3d 1249 (11th Cir. 2006), cert. denied, ___ U. S. ___ (127 SC 3010, 168 LE2d 728) (2007). After the trial court issued a new order for his execution, Davis filed an extraordinary motion for new trial on July 9, 2007, eight days before the beginning of the week-long period set for his execution. See OCGA § 5-5-41 (b). The trial court denied the extraordinary motion for new trial without conducting a hearing. Davis then filed an application for discretionary

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[1] On direct appeal, this Court adopted the spelling of the victim's name contained in the trial transcripts. We now adopt the spelling that presently appears to be correct.

appeal and a motion for a stay of execution in this Court. While the application was pending, the State Board of Pardons and Paroles granted a temporary stay of execution and scheduled a hearing. On August 3, 2007, this Court dismissed Davis's motion for a stay of execution as moot and granted his application for discretionary appeal. Davis v. State, 282 Ga. 368 (651 SE2d 10) (2007). The State Board of Pardons and Paroles then rescinded its stay of execution and suspended its consideration of Davis's petition for clemency while this Court considers the instant appeal. In light of the following discussion, we conclude that the trial court did not abuse its discretion in denying Davis's extraordinary motion for new trial without first conducting a hearing, and, accordingly, we affirm.[2]

1. The evidence at trial authorized the jury to find the following: In the early morning of August 19, 1989, Davis was at a pool hall in Savannah with his friends, Sylvester "Red" Coles and sixteen-year-old Darrell "D.D." Collins. Nearby, a homeless man named Larry Young was exiting a convenience store. Coles asked Young for one of the beers Young had just purchased. When Young refused, Coles followed him up the street, cursing at him. Davis and Collins circled around a bank in an apparent flanking maneuver and joined Coles in surrounding Young. Someone shouted a threat about shooting Young, and Davis came from behind Young and struck him in the head with a pistol,

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[2] We must point out that, contrary to the dissent's implication otherwise, this opinion does not hold and nowhere states that recantations and confessions must be categorically excluded and never considered in cases such as this. Nor do we hold that a trial court has no right to hold a hearing to consider the evidence with which it has been presented. We simply hold that, in dealing with the evidence and in its decision not to hold a hearing, the trial court did not abuse the discretion with which it is empowered by law under the facts of this case.

injuring him badly. Collins fled as soon as Young was struck. Davis and Coles fled immediately afterward when it became obvious that the police were being called. Mark MacPhail, a police officer working off-duty at the nearby bus station and Burger King, began pursuing Davis and Coles and shouted for them to stop. Coles stopped, and MacPhail ran past him. Davis kept running and fired a handgun at MacPhail, who was shot and fell. Davis then stood over MacPhail smiling and fired again. Altogether, MacPhail was shot three times, once in the face, once in the right thigh, and once in the chest.

Earlier on the night of the murder, a man named Michael Cooper was shot while leaving a party. A bullet retrieved from Michael Cooper's body during his medical treatment was similar to bullets from the murder scene. Shell casings retrieved from the two scenes were matched with greater certainty. Testimony at trial identified Davis as the person who shot Michael Cooper.

At trial, Davis's defense centered on the theory that Coles was the murderer. Both Davis and Coles testified, each claiming their innocence. The evidence at trial authorized the jury to conclude beyond a reasonable doubt that Davis was the man who struck Larry Young and shot Officer MacPhail.

2. Because the statutes authorizing extraordinary motions for new trials are silent as to procedural details, "the procedural requirements for such motions are the product of case law." Dick v. State, 248 Ga. 898, 899 (2) (287 SE2d 11) (1982). We have held that a new trial may be granted based on newly-discovered evidence only where the defendant shows each of the following:

> (1) that the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; (3) that it is so material

> that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be procured or its absence accounted for; and (6) that a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness.

Timberlake v. State, 246 Ga. 488, 491 (1) (271 SE2d 792) (1980) (punctuation and citations omitted). "Failure to show one requirement is sufficient to deny a motion for a new trial." Id. (emphasis supplied). Extraordinary motions for new trial are "not favored," and a "a stricter rule is applied to an extraordinary motion for a new trial based on the ground of newly available evidence than to an ordinary motion on that ground. " Crowe v. State, 265 Ga. 582, 590-591 (15) (458 SE2d 799) (1995) (punctuation and citation omitted). A trial court's ruling on such a motion "will not be reversed unless it affirmatively appears that the court abused its discretion. [Cit.]" Young v. State, 269 Ga. 490, 491-492 (2) (500 SE2d 583) (1998) (punctuation and citation omitted). For the reasons set forth below, we conclude that the trial court did not abuse its discretion in denying Davis's extraordinary motion for new trial without first conducting a hearing, particularly in light of the requirement under Timberlake that newly-discovered evidence be so material that it probably would result in a different verdict, Timberlake, 246 Ga. at 491 (1), and in light of the duty of a defendant to present in the affidavits supporting his or her extraordinary motion for new trial "facts sufficient to authorize that the motion be granted," Dick, 248 Ga. at 899 (2) (emphasis in original).

3. Davis's extraordinary motion for new trial relied primarily on affidavit testimony consisting of four types, recantations by trial witnesses, statements recounting alleged admissions of guilt by Coles, statements that Coles disposed of a handgun following the murder, and an alleged

eyewitness account. We discuss each of these affidavits, which are the ones highlighted by Davis in his brief on appeal, by category below.

A. Recantations by Trial Witnesses

This Court has noted the general lack of credibility that should be assigned to recantation testimony in the context of an extraordinary motion for new trial, stating that such "[d]eclarations made after the trial are entitled to much less regard than sworn testimony delivered at the trial." Norwood v. State, 273 Ga. 352, 353 (2) (541 SE2d 373) (2001) (quoting Johnson v. State, 236 Ga. App. 764, 765 (1) (513 SE2d 291) (1999)). Trial testimony is closer in time to the crimes, when memories are more trustworthy. Furthermore, the trial process itself, including public oaths, cross-examination, and the superintendence of a trial judge, lends special credibility to trial testimony. Accordingly, we have quoted the Court of Appeals as follows:

> "The only exception to the rule against setting aside a verdict[,] without proof of a material witness' conviction for perjury, is where there can be no doubt of any kind that the State's witness' testimony in every material part is purest fabrication." Cit. A recantation impeaches the witness' prior testimony. Cit. However, it is not the kind of evidence that proves the witness' previous testimony was the purest fabrication. See, e.g., Fugitt v. State, [251 Ga. 451 (1) (307 SE2d 471) (1983)] (the evidence offered was extrinsic proof that the witness' testimony was physically impossible; consequently, the trial court was able to determine the truth of the matter without having to take into account the witness' credibility).

Id. See also Drake v. State, 248 Ga. 891, 894 (287 SE2d 180) (1982). The trial court relied on this principle in disregarding the alleged recantations in Davis's case. Davis argues that the sheer number of recantations in his case demands a different analysis. Pretermitting whether such an argument might ever be persuasive, we find it unpersuasive in Davis's case in light of the analysis that follows. Thus, under the right for any reason principle, we conclude that Davis has failed to show that these alleged recantations support his extraordinary motion for new trial.

At trial, Jeffrey Sapp testified that he was an acquaintance of Davis and knew him by the nickname, "Rough as Hell." Sapp further testified at trial that Davis admitted that he struck Larry Young, shot Mark MacPhail, and then "finished the job." In an affidavit dated 1996, Sapp stated that he had lied to officers about Davis's admission because he wanted the officers to stop "harassing" him and that he later felt pressured by authorities to maintain his story at trial. Kevin McQueen also testified at trial that Davis confessed his guilt to him. McQueen testified that Davis, while in jail, admitted to shooting MacPhail and then shooting him again to ensure his death because MacPhail had seen his face. McQueen stated in an affidavit dated 1996 that he lied at trial because he was angry at Davis. We note that, even if the recantations by Sapp and McQueen were credited as true, they would show merely that Davis did not admit his guilt to these witnesses, not that Davis was not guilty. Furthermore, the witnesses' original testimony against Davis would remain admissible against him in any retrial. These affidavits lack the type of materiality required to support an extraordinary motion for new trial, as they do not show the witnesses' trial testimony to have been the "purest fabrication." Norwood, 273 Ga. at 353 (2) (punctuation and citation omitted). See Timberlake, 246 Ga. at 491 (1). Furthermore, we note that these affidavits were both obtained in 1996, long before Davis initiated his federal habeas corpus proceedings. Thus, it appears that Davis has not been diligent in presenting these

affidavits to the trial court, which is another of the requirements in an extraordinary motion for new trial. Id. See Llewellyn v. State, 252 Ga. 426, 428-429 (2) (314 SE2d 227) (1984) (holding that a post-trial delay in obtaining and presenting allegedly-exculpatory evidence shows a lack of required diligence).

Larry Young gave testimony at trial that tended to identify Davis as the one who struck him. His testimony addressed, in part, the clothing persons involved were wearing and the location they were standing during the argument and when Young was struck. In an affidavit dated 2002, Young stated that he was, in fact, unable to "remember what anyone looked like or what different people were wearing" and that he "just couldn't tell who did what." This new expression of uncertainty fails to show that Davis was not in fact the perpetrator and fails to show that the witness's testimony was the "purest fabrication"; therefore it lacks the materiality necessary to support an extraordinary motion for new trial. Norwood, 273 Ga. at 353 (2) (citation and punctuation omitted). See Timberlake, 246 Ga. at 491 (1).

Darrell Collins, the sixteen-year-old boy who followed Davis as he approached Larry Young, testified at trial that he witnessed Davis striking Young. This testimony was important because other witnesses testified that the person who struck Young also shot MacPhail. Collins stated in an affidavit dated 2002 that he did not witness Young's being struck. Collins also stated that he felt pressured to testify as he did. This testimony does not in any way show that Davis was not guilty of striking Young and shooting MacPhail, and Collins's original trial testimony would still be admissible against Davis in any retrial. Collins's affidavit lacks the type of materiality required to support an extraordinary motion for new trial, as it does not show Collins's trial testimony to have been the "purest fabrication." Norwood, 273 Ga. at 353 (2) (citation and punctuation omitted). See Timberlake, 246 Ga. at 491 (1).

Antoine Williams testified at trial that he was "sixty percent" certain that Davis was the shooter. His testimony also included a description of the location of the person who struck Larry Young that was consistent with Davis's location. In an affidavit dated 2002, he stated that he could not identify the shooter. Because there is nothing in this affidavit testimony that indicates affirmatively that Davis was not guilty, and because Williams's original testimony would be admissible against Davis at any retrial, the affidavit testimony lacks the type of materiality required to support an extraordinary motion for new trial, as it does not show Williams's trial testimony to have been the "purest fabrication." Id..

Dorothy Ferrell identified Davis at trial as the shooter. In an affidavit dated 2000, she states that she felt pressured to make the identification and that she did not actually see who shot MacPhail. Again, however, her new version of events lacks the required materiality, because her original trial testimony would be admissible against Davis at any retrial and because her new affidavit testimony does not show her trial testimony to have been the "purest fabrication." Id.

Harriet Murray identified Davis at trial as the shooter, describing in detail his physical features on the night of the murder and his gun. She was cross-examined about inconsistencies between her trial testimony and statements she made to investigators and in Davis's preliminary hearing; however, she never backed down from her identification of Davis. Davis submitted an un-notarized statement from Murray dated 2002 in support of his extraordinary motion for new trial in which she seems to identify Coles as the shooter. Davis also submitted an affidavit dated 2002 from an attorney stating that, when she signed her statement, Murray refused to wait for a notary to arrive or to allow a notary to come to her house later. As we noted above, an extraordinary motion for new trial must include the "affidavit of the witness himself" or an adequate explanation for its absence. Timberlake, 246

Ga. at 491 (1). We find that the five-year-old affidavit presented by Davis as an explanation for the absence of Murray's sworn testimony is inadequate, and, accordingly, we disregard her unsworn statement. Furthermore, even if we were to consider this unsworn statement, we find that yet another inconsistent statement from Murray, made years after the murder, would lack the materiality required to support Davis's extraordinary motion for new trial because it does not show her trial testimony to have been the "purest fabrication." Norwood, 273 Ga. at 353 (2) (citation and punctuation omitted). See Timberlake, 246 Ga. at 491 (1).

B. Statements Recounting Alleged Admissions of Guilt by Coles

We have held as follows:

> It is the long-standing rule in this state that declarations to third persons against the declarant's penal interest, to the effect that the declarant, and not the accused, was the actual perpetrator of the offense, are not admissible in favor of the accused at his trial . . . or to procure a new trial on the basis of newly discovered evidence.

Timberlake, 246 Ga. at 492 (1). This rule rests at least in part on the concept that a trial court should consider only evidence that would be admissible if a new trial were ordered. See Herrin v. State, 230 Ga. 476, 478-479 (2) (197 SE2d 734) (1973). See also OCGA § 5-5-23 (mandating that newly-discovered evidence presented in a motion for new trial must not be merely impeaching). However, we have held that testimony recounting admissions of guilt by a declarant to a third party are admissible at trial when "the declarant is present, testifies, and is subject to cross-examination." Guess v. State, 262 Ga. 487, 488-489 (2) (422 SE2d 178) (1992). As we have noted already, Coles testified at Davis's trial, so

any alleged admission of guilt by him to a third party would have been admissible at Davis's original trial. Such testimony at trial would be substantive evidence and not merely impeaching of the declarant. Gibbons v. State, 248 Ga. 858, 862 (286 SE2d 717) (1982). But our rule against allowing testimony about such alleged admissions to third persons also rests on the separate rationale that "a person could subvert the ends of justice by [falsely] admitting the crime to others and then absenting himself." Timberlake, 246 Ga. at 492 (1). This concern would exist in the context of an extraordinary motion for new trial even where the declarant has previously testified at trial. We need not decide here, however, whether the rule against such testimony in support of an extraordinary motion for new trial should apply even where the declarant has testified at trial, because the affidavits in question are not sufficiently material to support an extraordinary motion for new trial. Id. at 491 (1).

Davis's extraordinary motion for new trial included an affidavit from Anthony Hargrove dated 2001. Anthony Hargrove stated that he is the brother of Gary Hargrove, whose affidavit is discussed below. Anthony Hargrove further stated that he and Sylvester Coles were smoking marijuana at a party about a year after Officer MacPhail's murder and that Coles stated that "he killed a policeman and a guy named Troy took the fall for it." Davis also presented an affidavit from Shirley Riley dated 2001 in which she stated that, while she and Coles were drinking beside a pool one day, she asked Coles what happened to the officer and he stated that he shot the officer but that it was an accident. Tellingly, however, she added the following: "Maybe Sylvester was just trying to impress me. I don't know for sure who actually shot the officer." Finally, Davis presented an affidavit from Darold Taylor dated 2001. Taylor stated that Coles frequently threatened people and boasted about his violent nature. He also stated that, one day when he and Coles were drinking beers together, he asked Coles about rumors that Coles was the shooter. Taylor stated that, after

first telling him to "stay out of his business," Coles indicated that he was the one who shot the officer. These three affidavits must be considered, if at all, in light of the evidence presented at trial, including Coles's own testimony. Even the statements about the alleged admissions themselves contain evidence that they are not trustworthy, as the statements show that Coles was someone who wanted to be feared and that at least one of the persons to whom he made his admissions doubted his account. Although the jury clearly would not have deemed these statements utterly irrelevant, the affidavits, if considered at trial, would have merely forced the jury to weigh Davis's guilt or innocence in ways that were independent of the trustworthiness of Davis and Coles, who both actually testified at trial and proclaimed their innocence. Thus, pretermitting the categorical analysis applied by the trial court and applying the right for any reason principle, we conclude that these affidavits are not sufficiently material to support Davis's extraordinary motion for new trial. Id.

C. Statements that Coles Disposed of a Handgun Following the Murder

Davis presented affidavits from Tonya Johnson and Anita Saddler stating that they observed Coles in possession of a handgun shortly after the murder. The trial court did not abuse its discretion in finding that these affidavits did not support Davis's extraordinary motion for new trial. Young, 269 Ga. at 491-492 (2). First, as the trial court found, Davis has failed to show that he exercised due diligence in obtaining and presenting this testimony earlier. Timberlake, 246 Ga. at 491 (1). Tonya Johnson was a witness at trial, so she was clearly available to Davis. Anita Saddler's affidavit testimony reveals that she could have been identified through Tonya Johnson, showing that she also was available to Davis at trial. Furthermore, as with other affidavits discussed above, Tonya Johnson's affidavit was obtained in 1996, and Davis has failed to show any reason for his failure to exercise due diligence in coming forward with this new evidence in

the trial court sooner, at least before his federal habeas proceedings began. See Llewellyn, 252 Ga. at 428-429 (2). Finally, the affidavits are not so material that they can support Davis's extraordinary motion for new trial. Timberlake, 246 Ga. at 491 (1). Although Coles testified that he disposed of his handgun before the murders, his and other testimony made clear that he had possessed a handgun earlier on the night of the murders. Davis's new testimony, even if not disregarded for other reasons, is not so material to that core question that it can support his extraordinary motion for new trial. Id.

D. Alleged Eyewitness Accounts

Daniel Kinsman was one of a number of members of the military waiting at the Burger King drive-through in a van during the murder. In an un-notarized statement dated 2002, Kinsman stated that he was "confident that [he] would not have been able to make any identification of the shooter due to poor lighting and the chaotic nature of the scene" and that the incident was "over as soon as it began." Nevertheless, Kinsman stated that he had no doubt that the shooter used his left hand and that, "while [he] could not make out the color of the gun, it had a shiny finish which was reflected from the muzzle flash." Kinsman's unsworn statement is followed by an affidavit from an attorney, also dated 2002, explaining that the attorney was "unsuccessful" in his repeated attempts to obtain a notary for Kinsman's statement. As with the unsworn statement of Harriet Murray, this five-year-old explanation for the absence of sworn testimony is inadequate. See Timberlake, 246 Ga. at 491 (1) (requiring the "affidavit of the witness himself" or an adequate explanation for its absence). Furthermore, as the trial court noted, Davis has failed to show that he exercised due diligence in obtaining this new testimony, which was obtained from a witness who was readily identifiable even pre-trial. Id. Finally, Davis's argument about the contents of this unsworn statement is questionable. Several witnesses testified at trial that the murder weapon was dark in color, not chrome like Coles's

handgun. While Kinsman stated in his affidavit that the finish of the handgun was "shiny," as many surfaces of various colors are, in the same affidavit he affirmatively disclaimed his ability to state what color the finish was. Thus, Kinsman's affidavit sheds little light on whether Coles's or Davis's handgun was the murder weapon. Furthermore, even if we were to accept that the shooter fired with his left hand, Davis has not attempted to show which is his dominant hand or which is Coles's dominant hand. Such details might seem trivial, but one who seeks to overturn his conviction for murder many years later bears a heavy burden to bring forward convincing and detailed proof of his innocence. Thus, the trial court understandably found that this testimony was not sufficiently material. Id. For all of the foregoing reasons, we conclude that the trial court did not abuse its discretion by concluding that Kinsman's affidavit did not support Davis's extraordinary motion for new trial. Young, 269 Ga. at 491-492 (2).

Gary Hargrove, apparently the brother of affiant Anthony Hargrove, stated in an affidavit dated 2001 that he was an eyewitness to the murder but that he never came forward, because he was on parole and was out past his curfew. However, upon our careful review of this affidavit, we find no abuse of discretion in the trial court's finding that this affidavit lacks sufficient materiality to support Davis's extraordinary motion for new trial. Id.; Timberlake, 246 Ga. at 491 (1). In fact, the affidavit might actually be read so as to confirm trial testimony that Davis was the shooter. Witnesses at trial indicated that one man struck Larry Young, continued to run when ordered to stop by Officer MacPhail, and then shot MacPhail. In his affidavit, Gary Hargrove indicated that Coles was the one who stood still during the murder and that Davis was the one who kept running. The true import of the witness's testimony appears to be that Davis was the one who ran from the officer. Furthermore, Davis bears a heavy burden to come forward with clear evidence of his innocence, not a craftily-worded and vague

account that can be represented as stating one thing when it might very well state the opposite. Thus, we find no abuse of discretion in the trial court's finding that the affidavit "falls short of the . . . assertion that Mr. Hargrove observed Mr. Coles murder Officer MacPhail" and the trial court's finding that the affidavit lacks sufficient materiality. Id.

4. Particularly in this death penalty case where a man might soon be executed, we have endeavored to look beyond bare legal principles that might otherwise be controlling to the core question of whether a jury presented with Davis's allegedly-new testimony would probably find him not guilty or give him a sentence other than death. In that spirit, we have chosen to focus primarily on one of the required showings for an extraordinary motion for new trial, the requirement that the new evidence be "so material that it would probably produce a different verdict." Timberlake, 246 Ga. at 491 (1). In weighing this new evidence, we do not ignore the testimony presented at trial, and, in fact, we favor that original testimony over the new. At least one original witness has never recanted his in-court identification of Davis as the shooter, which included a description of his clothing and the location he was in when he struck Larry Young. As we have noted above, most of the witnesses to the crime who have allegedly recanted have merely stated that they now do not feel able to identify the shooter. At trial, the jury had the benefit of hearing from witnesses and investigators close to the time of the murder, including both Davis and Coles claiming the other was guilty. We simply cannot disregard the jury's verdict in this case. For that reason, along with the other reasons set forth above, we conclude that the trial court did not abuse its discretion in denying Davis's extraordinary motion for new trial. Young, 269 Ga. at 491-492 (2).

5. Davis argues that the trial court should not have denied his extraordinary motion for new trial without first holding a hearing. We have held as follows:

> if the pleadings in an extraordinary motion for new trial in a criminal case do not contain a statement of facts sufficient to authorize that the motion be granted if the facts developed at the hearing warrant such relief, it is not error for the trial court to refuse to conduct a hearing on the extraordinary motion.

Dick, 248 Ga. at 899 (2) (emphasis in original). This requirement mandates that a defendant provide sworn affidavit testimony, or an explanation for the absence of such affidavit testimony, showing with clarity and specificity the facts he or she intends to prove in a hearing and how those proffered facts support his or her claim that a new trial is warranted. Upon our careful review of Davis's extraordinary motion for new trial and the trial record, we find that Davis failed to present such facts in his motion and, therefore, that the trial court did not abuse its discretion in denying that motion without a hearing.

6. Davis argued in the trial court that to apply Georgia's procedures for extraordinary motions for new trial in a manner that allows for his execution would be unconstitutional. See Herrera v. Collins, 506 U. S. 390 (113 SC 853, 122 LE2d 203) (1993). We hold that Georgia law, as described and applied above, is not unconstitutional.

Judgment affirmed. All the Justices concur, except Sears, C.J., Hunstein, P.J., and Benham, J., who dissent.

S07A1758. DAVIS v. THE STATE.

SEARS, Chief Justice, dissenting.

As the majority notes, Georgia law is largely silent regarding the standards that should govern extraordinary

motions for new trial. Thus, by necessity, "the procedural requirements for such motions are the product of case law."[1] This Court has attempted to set standards that promote respect for the judicial process and confidence in the outcomes of that process. Thus, we have required that defendants exercise diligence in discovering and bringing their claims, and we have set the threshold very high for showing that new evidence should take precedence over the evidence presented at trial.[2] However, I believe that this case illustrates that this Court's approach in extraordinary motions for new trials based on new evidence is overly rigid and fails to allow an adequate inquiry into the fundamental question, which is whether or not an innocent person might have been convicted or even, as in this case, might be put to death.

We have noted that recantations by trial witnesses are inherently suspect, because there is almost always more reason to credit trial testimony over later recantations. However, it is unwise and unnecessary to make a categorical rule that recantations may never be considered in support of an extraordinary motion for new trial. The majority cites case law stating that recantations may be considered only if the recanting witness's trial testimony is shown to be the "purest fabrication."[3] To the extent that this phrase cautions that trial testimony should not be lightly disregarded, it has obvious merit. However, it should not be corrupted into a categorical rule that new evidence in the form of recanted testimony can never be considered, no matter how trustworthy it might appear. If recantation testimony, either alone or supported by

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[1] Dick v. State, 248 Ga. 898, 899 (2) (287 SE2d 11) (1982).

[2] Timberlake v. State, 246 Ga. 488, 491 (1) (271 SE2d 792) (1980).

[3] Norwood v. State, 273 Ga. 352, 353 (2) (541 SE2d 373) (2001) (quoting Johnson v. State, 236 Ga. App. 764, 765 (1) (513 SE2d 291) (1999))

other evidence, shows convincingly that prior trial testimony was false, it simply defies all logic and morality to hold that it must be disregarded categorically.

The majority opinion also notes concerns about confessions by persons other than the defendant. In particular, the majority states that a witness might falsely confess and then flee prosecution. However, this concern could be addressed by requiring the witness to appear in the trial court before his or her alleged confession may be considered. Thus, the trial court would have benefit of the same testimony and cross-examination that a jury would have if a new trial were ordered.

The majority opinion wisely states the following:

> [W]e have endeavored to look beyond bare legal principles that might otherwise be controlling to the core question of whether a jury presented with Davis's allegedly-new testimony would probably find him not guilty or give him a sentence other than death.

Maj. Op., p. 19. I would go further. Because this Court is entrusted with establishing the procedures and standards governing extraordinary motions for new trial, I would hold that recantations and confessions to third parties are not categorically excluded.[4] Instead, they should be assessed by

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[4] The effect of the majority's ruling that the witnesses' recantations "lack the type of materiality required to support an extraordinary motion for new trial, as they do not show the witnesses' trial testimony to have been the 'purest fabrication,'" Maj. Op., p. 8-9, is to categorically exclude recantations except in those exceedingly-rare instances when the fabrication is proven by extrinsic evidence, see Fugitt v. State, 251 Ga. 451 (1) (307 SE2d 471) (1983). Also, the majority merely pretermits the question of whether confessions by another to third parties should be admissible, rather than explicitly holding that they are admissible.

the trial court within its sound discretion.[5] This Court was right to hold that such testimony is inherently suspect, and the Court was right to hold that a trial court should consider only such evidence as would be admissible if a new trial were ordered. However, this Court is free to adopt rules and standards that best promote the ends of justice, and this case illustrates with alarming clarity why this Court's rules should allow trial courts to consider all forms of evidence that would be admissible if a new trial were ordered and to exercise sound discretion in weighing that evidence.

While the majority wisely decides to look beyond bare legal principles and seeks to consider the strength of Davis's new evidence, I believe that it has weighed that evidence too lightly. In this case, nearly every witness who identified Davis as the shooter at trial has now disclaimed his or her ability to do so reliably. Three persons have stated that Sylvester Coles confessed to being the shooter. Two witnesses have stated that Sylvester Coles, contrary to his trial testimony, possessed a handgun immediately after the murder. Another witness has provided a description of the crimes that might indicate that Sylvester Coles was the shooter. Perhaps these witnesses' testimony would prove incredible if a hearing were held. Perhaps the majority is correct that the alleged eyewitness's testimony will actually show Davis's guilt rather than his innocence. But the collective effect of all of Davis's new testimony, if it were to be found credible by the trial court in a hearing,[6] would show

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[5] Young v. State, 269 Ga. 490, 491-492 (2) (500 SE2d 583) (1998).

[6] The issues raised by the majority regarding Davis's diligence in bringing his new evidence before the trial court and regarding the fact that several of the affidavits are not notarized also seem well suited to being addressed by the trial court in a hearing under the facts of this case. Furthermore, even if the affidavits affected by these issues were discounted, I still believe a hearing on the remaining new evidence would be warranted.

the probability that a new jury would find reasonable doubt of Davis's guilt or at least sufficient residual doubt to decline to impose the death penalty. Accordingly, I would order the trial court to conduct a hearing, to weigh the credibility of Davis's new evidence, and to exercise its discretion in determining if the new evidence would create the probability of a different outcome if a new trial were held. I am authorized to state that Presiding Justice Hunstein and Justice Benham join in this dissent.

APPENDIX B -- ORDER DENYING EXTRAORDINARY MOTION FOR NEW TRIAL AND MOTION FOR STAY OF EXECUTION BY THE SUPERIOR COURT OF CHATHAM COUNTY DATED JULY 13, 2007

IN THE SUPERIOR COURT OF CHATHAM COUNTY

STATE OF GEORGIA

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CHATHAM COUNTY, GA

STATE OF GEORGIA,

vs. Criminal No. CR89-2467-FR

TROY ANTHONY DAVIS,

Defendant.

ORDER ON DEFENDANT'S EXTRAORDINARY MOTION FOR NEW TRIAL and MOTION FOR STAY OF EXECUTION

Before the Court are Defendant's Extraordinary Motion for New Trial Pursuant to O.C.G.A. § 5-5-41(c)[1] ("Extraordinary Motion for New Trial") and Motion for Stay of Execution. The Court, recognizing the attendant gravity of

[1] The Court notes that while Defendant cites O.C.G.A. § 5-5-41(c) as authority for this Extraordinary Motion for New Trial, it appears to the Court that Defendant actually brings such motion pursuant to O.C.G.A. § 5-5-41(b) as Defendant fails to argue such statutory authority in his Brief and, further, fails to comply with the requirements of O.C.G.A. § 5-5-41(c) et sq. to bring such Motion.

these motions, and having thoroughly and carefully read and considered these two Motions and further related pleadings, the State's responses thereto, the entire record and the applicable law, hereby finds as follows:

Extraordinary Motion for New Trial

Defendant moves this Court to convene a hearing on Defendant's Extraordinary Motion for New Trial. In his brief, Defendant argues that "newly discovered evidence" requires that a new trial be granted. Although O.C.G.A. § 5-5-41(b) authorizes Defendant to make such a Motion, the Court recognizes that in general, the Georgia Courts do not favor extraordinary motions for new trial. Dick v. State, 248 Ga. 898, 899 (1982) ("Extraordinary motions for a new trial are not favored, and a stricter rule is applied to an extraordinary motion based on the ground of newly available evidence than to an ordinary motion on that ground.") (cit. omitted). Defendant bears a heavy burden in bringing such a motion. Specifically:

> It is incumbent on a party who asks for a new trial on the ground of newly discovered evidence to satisfy the court: (1) that the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; (3) that it is so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be procured or its absence accounted for; and (6) that a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness.

Drake v. State, 248 Ga. 891, 894 (1982)(cit. omitted). To meet his burden, Defendant's pleadings and accompanying

affidavits must set forth "facts satisfying these requirements; conclusions of counsel will not suffice." Dick, 248 Ga. At 900. "Failure to show one requirement is sufficient to deny a motion for new trial." Timberlake v. State, 246 Ga. 488, 491 (1980)(cit. omitted). Moreover, an extraordinary motion for new trial that fails to show "any merit" may be denied a requested hearing. Dick, 248 Ga. At 899.

Defendant argues in his brief that newly discovered evidence warrants a new trial.[2] Specifically, Defendant submits to the Court affidavits that fall generally into the following categories: (1) evidence characterized by the Defendant as recantations of trial testimony[3]; (2) evidence averring post-trial confessions by Mr. Sylvester Coles[4]; (3) affidavits of persons who have not previously testified who were either present at the scene of the murder of Officer

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[2] This Court notes that while Defendant's Extraordinary Motion for New Trial does not exceed statutory authority for timely filing, the majority of affidavits submitted by Defendant were sworn over five years ago and a few affidavits were sworn over ten years ago. The Georgia Supreme Court has looked askance at evidence that was obtained four years post-trial and then was not submitted to the Court for two additional years, at which point it formed the basis of an extraordinary motion for new trial. "The statutes which control extraordinary motions for new trial based on newly discovered evidence require a defendant to act without delay in bringing such motion. The obvious reason for this requirement is that litigation must come to an end." Llewellyn v. State, 252 Ga. 426, 428 (1984).

[3] In his brief Defendant argues that the following individuals have now recanted or materially recharacterized their previous testimony: Larry Young; Harriet Murray; Dorothy Ferrell; Antoine Williams; Darrel "D.D." Collins; Kevin McQueen; and Jeffrey Sapp.

[4] Defendant submits affidavits from Anthony Hargrove, Shirley Riley and Darold Taylor wherein each affiant states that Mr. Coles has implicated himself in the murder of Officer MacPhail.

MacPhail or in the general area in the moments following the crime; (4) expert affidavits; (5) affidavits of jurors; and (6) a general cache of affidavits that do not fall into the above-enumerated categories. The court has exhaustively reviewed each submitted affidavit and considered in great detail the relevant trial testimony, if any, corresponding to each.

The Court finds that the first category of evidence submitted by Defendant fails to meet the newly discovered evidence standard under well-settled Georgia law. "A post-trial declaration by a State witness that his former testimony was false is not cause for a new trial." Pryor v. State, 179 Ga. App. 293, 294 (1986)(cit. omitted); Brown v. State, 209 Ga. App. 314, 316 (1993); Drake v. State, 248 Ga. 891, 894 (1982).

The second category of evidence submitted by Defendant contains affidavits wherein the affiants allege that Mr. Coles confessed the murder to them. Accordingly, these three affidavits contain inadmissible hearsay. "It is the long-standing rule in this state that declarations to third persons against the declarant's penal interest, to the effect that the declarant, and not the accused, was the actual perpetrator of the offense, are not admissible in favor of the accused at his trial." Timberlake, 246 Ga. at 492. Accordingly, these three affidavits fail to meet the threshold or "overriding" requirement of the six-part standard that the newly discovered evidence be admissible. Dick, 248 Ga. at 900.

The third category of evidence submitted by Defendant contains affidavits by persons who have not previously given testimony in this case, wherein the affiants were either present at the scene of the crime or in the general vicinity thereof. Each of these affidavits fails to meet the six-part standard.

The first such affidavit, of Gary Hargrove, dated August 17, 2001, states that he observed whom he believed to

be Mr. Davis running from the scene of the crime. The affidavit further states that a person Mr. Hargrove establishes as Mr. Sylvester Coles was facing the body of Officer MacPhail. The Court first notes that this affidavit falls short of the brief's plain assertion that Mr. Hargrove observed Mr. Coles murder Officer MacPhail, and such assertion is clearly discouraged. Dick, 248 Ga. at 899 (holding that Defendant must meet his burden through pleadings and affidavits that set forth "facts satisfying these requirements; *conclusions of counsel will not suffice*")(emphasis added). Moreover, the Court finds such evidence to be cumulative to that heard at trial. Defendant concedes as much in his brief.[5] Accordingly, the Court finds that Defendant does not establish to this Court that the affidavit of Mr. Gary Hargrove meets elements two, three and four of the six-part standard, described, supra.

The Court likewise finds that Defendant fails to meet his burden regarding the affidavits of Anita Saddler and Daniel Kinsman and therefore such affidavits do not qualify as newly discovered evidence. The affidavit of Ms. Sadler, July 10, 2002, states that she observed Mr. Coles with a gun in his possession minutes after the murder occurred and also that he acted nervously. This affidavit provides cumulative evidence and serves to impeach Mr. Coles, who testified at trial that he was in possession of a gun the evening of the murder but that he had discarded said weapon prior to the occurrence of the crime. As such, Ms. Sadler's affidavit fails to meet elements two, three, four and six of the six-part standard.

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[5] "[H]argrove's affidavit corroborates trial witness Joseph Washington's affidavit and trial testimony that identified Red Coles as the assailant who shot and killed Officer MacPhail." Defendant's Brief at 11.

Defendant next presents the unsworn affidavit of Daniel Kinsman, allegedly signed in October 2002, who states that the perpetrator shot with his left hand and that the murder weapon had a shiny finish. The Court finds, however, that Defendant fails to meet his burden to establish elements to and three, and therefore Kinsman's affidavit similarly fails to meet the requisite six-part standard.

The fourth category of evidence submitted by Defendant consists of two affidavits purporting to present expert testimony. One such affidavit, from Jeffrey Neuschatz, dated July 6, 2007, argues generally that practice standards on witness identification have changed since the 1991 trial. The second affidavit, from Kelly Fite, dated April 18, 2003, discusses ballistics evidence and is apparently submitted to impeach the expert testimony elicited by the State at trial. The Court finds that both affidavits fail to meet elements two, four and six of the six-part standard.

The fifth category of evidence submitted by Defendant includes affidavits from jurors who, after reviewing selected affidavits, now express concerns about the case. The Court finds that the jurors' affidavits do not form a legal basis of support for Defendant's Extraordinary Motion for New Trial. "The Georgia Code reflects the venerable common law rule prohibiting jurors from impeaching their verdict." Gaines v. State, 274 Ga. App. 575, 576 (noting that O.C.G.A. § 17-9-41 provides that "[t]he affidavits of jurors may be taken to sustain but not to impeach their verdict").

The sixth category of evidence submitted by Defendant contains all remaining affidavits. The Court finds that Defendant fails to meet his burden for all such affidavits wherein he fails to satisfy this Court that each such affidavit meets the six-part standard.

Wherefore, in light of the foregoing, and the Court having found that Defendant has failed to carry his burden on

each and every submitted affidavit, the Court hereby **DENIES** Defendant's request for a hearing and **DENIES** Defendant's Extraordinary Motion for New Trial.

Motion for Stay of Execution

Defendant moves this Court to stay his execution pending this Courts' determination of Defendant's Extraordinary Motion for New Trial. The Court, having denied Defendant's Extraordinary Motion for New Trial, accordingly **DENIES** Defendant's Motion for Stay of Execution.

SO ORDERED THIS 13TH DAY OF JULY, 2007.

S/PENNY HAAS FREESEMANN, JUDGE
SUPERIOR COURT, E.J.C.
STATE OF GEORGIA

cc: Thomas Dunn, Esq.
Spencer Lawton, DA
David Lock, ADA